

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

JUL 15 10 53 AM '92

MM Docket No. 92-1009

DISPATCHED BY

In re Applications of

JEFFREY SCOTT
(hereafter "Scott")

File No. BPH-910213ME

EICHER
COMMUNICATIONS, INC.
(hereafter "Eicher")

File No. BPH-910213MF

For Construction Permit for a
New FM Station on Channel 278A
in Bethany Beach, Delaware

HEARING DESIGNATION ORDER

Adopted: May 5, 1992;

Released: May 14, 1992

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.¹

2. *Preliminary Matter.* On May 16, 1991, Scott filed a timely amendment to move his transmitter site to a new location.² An engineering review of this amendment reveals that the proposal creates short-spacing in violation of 47 C.F.R. § 73.207. Scott recognized this problem and requested processing under 47 C.F.R. § 73.213(c)(1) for all short-spaced stations.

3. Section 73.213(c), as amended, states that "[i]f the reference coordinates of an allotment are short-spaced to an authorized facility or another allotment (as a result of the revision of § 73.207 in the *Second Report and Order* in MM Docket 88-375), an application for the allotment may be authorized, and subsequently modified after grant, in accordance with paragraph (c)(1) or (c)(2) of this section *only with respect to such short spacing* (emphasis added). See *Memorandum Opinion and Order* in MM Docket 88-375, 6 FCC Rcd 3417, 3424 (1991). A review of Scott's application indicates that 47 C.F.R. § 73.213(c)(1) cannot

be applied to the required separation distance to WGMS(FM), Washington, D.C. because the allotment for channel 278A in Bethany Beach, Delaware is not short-spaced to WGMS.

4. We acknowledge that prior to the release of the *Memorandum Opinion and Order* in MM Docket 88-375, the policy discussed above regarding "grandfathered" stations or allotments may have been somewhat unclear. Accordingly, return of Scott's May 16, 1991 amendment with no opportunity to correct the defect would be inappropriate. Compare *Rochelle C. Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985) (dismissal inappropriate where rules are unreasonably ambiguous) with *Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991) (dismissal affirmed where rules are clear). On July 2, 1991, Scott filed a petition for leave to amend and submitted an untimely amendment which cures the 47 C.F.R. § 73.213(c)(1) deficiency by requesting processing under 47 C.F.R. § 73.215 with respect to station WGMS. Since it is the Commission's policy under *Salzer, supra*, to allow Scott to file a post-designation amendment under these circumstances, for administrative good cause, we will accept the July 2, 1991 amendment.³ However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

5. *RF Radiation.* Eicher is proposing to locate its transmitting antenna on a new tower while Scott is proposing to locate its transmitting antenna on an existing tower. Our engineering study indicates that both of the applicants failed to address the matter of how they propose to resolve any RF exposure to workers on their respective towers. See 47 C.F.R. § 1.1307(b). Consequently, we are concerned that both may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14,999 (April 12, 1986). See also, *Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Section 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since Scott and Eicher failed to indicate how workers engaged in maintenance and repair would be

¹ The applicants have filed a document purported to be a settlement agreement. In actuality, it is a private contractual agreement which states that if the Commission grants Eicher's petition to deny Scott's application, Scott will dismiss his application and forego any rights of appeal or, alternatively, if the Commission denies the petition and designates both applications for hearing, Eicher will not file a notice of appearance, thus allowing for a grant of Scott's application. The Commission will neither approve nor disapprove of this private agreement.

² On June 17, 1991, Eicher timely filed a petition to dismiss or deny Scott's application. Eicher contends that Scott's May 16, 1991 amendment was defective because it failed to include a request for processing under Section 73.215's contour protection

procedures with regard to WGMS(FM), Washington, D.C. Eicher further contends that once the defective amendment is returned, Scott is forced to rely on his original application which is also defective because it creates impermissible short-spacing. Scott filed an opposition to Eicher's petition on July 2, 1991. On the same day, Scott filed a petition for leave to amend and an amendment requesting processing under Section 73.215. Eicher replied on July 19, 1991. In view of the following, we will deny Eicher's petition.

³ On July 17, 1991, Eicher filed an opposition to Scott's petition for leave to amend. On July 29, 1991, Scott replied to Eicher's opposition.

protected from exposure to levels exceeding the ANSI guidelines, both will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally*, OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure to Radiofrequency Radiation," at 28. Therefore, Scott and Eicher will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 2289 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the presiding judge shall thereafter not consider the environmental effects of the proposals. *See* 47 C.F.R. § 1.1308(d).

6. *Multiple Ownership.* Scott currently has an ownership interest in WZBH(FM), Georgetown, Delaware. Scott pledges to divest any attributable interest he may hold in station WZBH or take steps to make that interest nonattributable. Accordingly, in the event of grant of Scott's application and if at that time Scott's interest in WZBH is over the 5% attribution benchmark, Scott will be required to come into compliance with 47 C.F.R. § 73.3555 prior to the commencement of program test authority.

7. *Other matters.* Data submitted by the applicants indicate that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 m/Vm or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Scott and Eicher in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.
2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IS IS FURTHER ORDERED, That the petition to dismiss or deny filed by Eicher Communications, Inc. IS HEREBY DENIED.

11. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Scott IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That, in accordance with paragraph 5 hereinabove, Scott and Eicher shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

13. IT IS FURTHER ORDERED, That in the event of grant of Scott's application, Jeffrey Scott will be ordered to come into compliance with 47 C.F.R. § 73.3555 with respect to station WZBH(FM), Georgetown, Delaware, prior to commencement of program test authority.

14. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau